

SURROGACY – LAWS AND MEDICAL ETHICS

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1. ABSTRACT

The paper seeks to compare the legal regimes with respect to surrogacy in the US and the UK. The experience, short comings and success of the laws in these countries can be used to better the Indian ART Bill, 2010. The paper also makes a reference to the 'medical ethics' involved in the practice in light of the ICMR guidelines on the subject.

2. INTRODUCTION

Surrogacy existed even in time of the Old Testament, where Abraham and Sarah used Hagar to bear a child for them.¹ In vitro fertilization became available in 1978 with the birth of "[t]he first test tube baby" in 1978, who was conceived through in vitro fertilization.² Surrogacy thereafter became more "widely available [and] prevalent" in the 1980s.³ The term "modern reproductive technologies" (MRT) refers to certain medical procedures currently available that were developed with the intention of aiding human reproduction.⁴ Specifically, MRT will refer to artificial insemination, Assisted Reproductive Technologies (ART), which include in vitro fertilization, as well as surrogacy, and also to genetic engineering and cloning of embryos. MRT which began more than thirty years ago, which at once seemed like science fiction⁵ has become now become common practice. In 2006 alone, the number of "test-tube" babies born in the United States numbered 54,656.⁶ More

impressively, if the recent trend continues, the number of "test-tube" births will continue to rise. There seem to be at least two cooperating theories seeking to explain the growth in the ART market. The first theory is that high infertility rates have created a large group of people looking for alternative means to start a family. MRT offers infertile parents the chance to conceive a child that is biologically their own, fulfilling a desire to unite a family through "flesh and blood."⁷ MRT can provide the closest substitute for natural conception because the resulting child can be genetically linked to both parents. The second theory is that the definition of the modern family has broadened the MRT consumer base to more than just young, infertile, married couples.⁸ Over time, there has been increased cultural acceptance of both MRT and non-traditional family structures like a single parent, homosexual parents, older parents, and career-focused mothers. In order to have children, many of these modern families are turning to MRT.

3. TYPES OF SURROGACY

There are two different types of surrogacy - partial and full.⁹ Both partial and full surrogacy can employ in vitro fertilization, but in partial surrogacy, artificial insemination is "the easiest, safest and cheapest."¹⁰ In partial surrogacy, the intended father fertilizes the surrogate mother's own egg through artificial insemination.¹¹ Consequently, the surrogate mother in partial surrogacy cases has a biological connection to the child equal to that of the intended father's. Though many women do choose to become surrogate mothers for mostly altruistic reasons, most parties agree that compensation is a fair and necessary part of the arrangement because of the toll that carrying a child

¹ Christine Metteer Lorillard, *Informed Choices And Uniform Decisions: Adopting The ABA's Self-Enforcing Administrative Model To Ensure Successful Surrogacy Arrangements*, 16 Cardozo J.L. & Gender 237, 243 (2010).

² Ruby L. Lee, Note, *New Trends In Global Outsourcing Of Commercial Surrogacy: A Call For Regulation*, 20 Hastings Women's L.J. 275, 275 (2009).

³ Lorillard, *Supra* Note 1, At 243.

⁴ For An Overview Of Several Forms Of Technology-Aided Reproductive Methods, See Murray L. Manus, *The Proposed Model Surrogate Parenthood Act: A Legislative Response To The Challenges Of Reproductive Technology*, 29 U. Mich. J.L. Reform 671, 677-79 (1996).

⁵ See *The First Test-Tube Baby*, Time, July 31, 1978, [Http://www.time.com/time/magazine/article/0,9171,946934,00.html](http://www.time.com/time/magazine/article/0,9171,946934,00.html) (Last Visited August 27, 2011).

⁶ Centres For Disease Control & Prevention, 2006 Assisted Reproductive Technology (Art) Report 1996-2006 Available At [Http://www.cdc.gov/art/art2006/sect5_fig49-64.htm#F49](http://www.cdc.gov/art/art2006/sect5_fig49-64.htm#F49) (Last Visited August 27, 2011).

⁷ Janet L. Dolgin, *Biological Evaluations: Blood, Genes, And Family*, 41 Akron L. Rev. 347, 366 (2008).

⁸ See Nadine A. Gartner, *Lesbian (M)Otherhood: Creating An Alternative Model For Settling Child Custody Disputes*, 16 Law & Sexuality Rev. 45, 48 (2007).

⁹ Carla Spivack, *The Law Of Surrogate Motherhood In The United States*, 58 Am. J. Comp. L. Supp. 97, 98 (2010).

¹⁰ Catherine Delair, *Ethical, Moral, Economic And Legal Barriers To Assisted Reproductive Technologies Employed By Gay Men And Lesbian Women*, 4 Depaul J. Health Care L. 147, 148 N.11 (2000).

¹¹ Spivack, *Supra* Note 7, At 98.

to term takes on the body and the fact that partial surrogacy may be the only way for the intended parents to have a child.¹²

In full, or gestational, surrogacy, both the sperm and the egg of the intended parents are implanted in the surrogate mother, severing her biological connection with the child. Full surrogacy uses in vitro fertilization, a process in which egg cells are fertilized by sperm outside the womb.¹³ Many couples prefer the partial method, however, because a foreign egg removed from the intended mother, fertilized, and placed in the surrogate's uterus is less likely to implant than an egg that never leaves the surrogate.¹⁴ Additionally, full surrogacy poses a greater medical risk to the surrogate mother, so the parties may prefer to utilize the partial surrogacy method instead. Finally, couples in which the intended mother is infertile do not have the option to use their own egg, so they must use partial surrogacy.

4. SURROGACY AND LAWS

The development of new technology has often begged questions that are not answered by the previously existing legal framework.¹⁵ Current advances in modern technologies are no different and are outpacing legislative and regulatory developments.¹⁶ Lack of regulation and a developed legal framework can make it impossible to control the risks associated with new technology. Such non-regulation of modern reproductive technologies will ultimately lead to the unavoidable commodification of motherhood. Commodification of the womb, sex cells, and DNA will revolutionize the way we view reproduction – but not necessarily for the better.¹⁷ Preventing commercialisation of ART need not necessarily be the aim of governments who should be focusing on regulating the safety of reproductive technologies. In order to best protect women's health and preserve their decision-making autonomy, it is necessary that we accept the unavoidable

commercialisation and focus legislative efforts on regulating the medical administration of modern reproductive technologies.

5. COMPARATIVE ANALYSIS

Before I analyse the ART Bill and its ramifications within Indian society, let us take a look at the laws and legal systems prevalent in the USA and the UK. The rapid development of ART has posed many novel legal questions concerning parental rights.¹⁸

6. UNITED STATES OF AMERICA & SURROGACY LAWS:

The extreme Federal nature of the USA means that surrogacy laws vary to a large extent from State to State. Federal regulations of ART are currently found in the Fertility Clinic Success Rate and Certification Act (FCSRCA),¹⁹ and in FDA donor tissue regulations.²⁰ The FCSRCA calls on the Centers for Disease Control and Prevention (CDC) to develop an accreditation program that sets standards for embryo agencies.²¹ The CDC released its "Model Program" in 1999, but it does not include minimum safety requirements for ART procedures. The regulations do not require testing for genetic diseases, however, nor do they set standards for ART procedural safety.²² Non-regulatory federal bodies have attempted to address questions left unanswered by federal regulation. For example, the President's Council on Bioethics issued a report in March 2004 titled 'The Regulation of New Biotechnologies'.²³

State law in the US regulates ART through physician and facility licensure.²⁴ Several states have also attempted to compensate for the lack of federal regulation by passing

¹² Delair, *Supra* Note 25, At 160-61.

¹³ Melissa Jeffries, *How In Vitro Fertilization Works*, Discovery Health, [Http://Health.Howstuffworks.com/Pregnancy-And-Parenting/Pregnancy/Fertility/In-Vitro-Fertilization.Htm](http://Health.Howstuffworks.com/Pregnancy-And-Parenting/Pregnancy/Fertility/In-Vitro-Fertilization.Htm) (Last Visited Sep. 4, 2011).

¹⁴ See, Heather Weller, *Traditional Versus Gestational Surrogacy*, [Www.suite101.com/article.cfm/surrogacy_new/64753](http://www.suite101.com/article.cfm/surrogacy_new/64753) (Last Visited August 25, 2011).

¹⁵ Ivan K. Fong, *Law And New Technology: The Virtues Of Muddling Through*, 19 Yale L. & Pol'y Rev. 443, 444 (2001).

¹⁶ Gary E. Marchant Et. Al., *What Does The History Of Technology Regulation Teach Us About Nano Oversight?*, 37 J.L. Med. & Ethics 724, 726-27 (2009).

¹⁷ Carla Spivack, *Supra* Note 7.

¹⁸ Barbara K. Kopytoff, *Surrogate Motherhood: Questions Of Law And Values*, 22 U.S.F. L. Rev. 205, 206 (1988).

¹⁹ 42 U.S.C. § 263(A)(1) (2006).

²⁰ Human Cells, Tissues, And Cellular And Tissue-Based Products, 21 C.F.R. §§ 1271.1, 1271.3 (2005).

²¹ Yaniv Heled, *The Regulation Of Genetic Aspects Of Donated Reproductive Tissue-The Need For Federal Regulation*, 11 Colum. Sci. & Tech. L. Rev. 243, 250 (2010).

²² See Human Cells, Tissues, And Cellular And Tissue-Based Products, 21 C.F.R. § 1271 (2005).

²³ President's Council On Bioethics, *Reproduction And Responsibility: The Regulation Of New Biotechnologies 95* (2004), Available At [Http://Bioethics.Georgetown.Edu/Pcbe/Reports/Reproductionandresponsibility](http://Bioethics.Georgetown.Edu/Pcbe/Reports/Reproductionandresponsibility) (Last Visited Sep 1, 2011).

²⁴ Yaniv Heled, *The Regulation Of Genetic Aspects Of Donated Reproductive Tissue-The Need For Federal Regulation*, 11 Colum. Sci. & Tech. L. Rev. 243, 250 (2010).

their own laws regarding ART, in addition to any licensure requirements they may have.²⁵ For example, many state legislatures have statutorily created regulatory schemes regarding commercial surrogacy agreements.²⁶ Throughout the years, the United States has solved custody disputes by enacting and interpreting laws that most often look to the best interests of the child.²⁷ The determination becomes more difficult, however, when a woman agrees before conception to bear a child for an infertile or same-sex couple and then changes her mind once the baby is born. Surrogacy cases raise additional concerns because it is not just custody, but parentage that is at issue. Unlike other regimes such as adoption, visitation, and custody that are becoming more settled in the United States, surrogacy remains the one area of family law that many states either disagree about or remain silent upon altogether.²⁸ Some courts agree the natural mother should have the opportunity to keep the child if she wishes,²⁹ but others argue that this path leads to a miscarriage of justice for those unfortunate couples that cannot conceive a child on their own.³⁰ Without uniform legislation or binding precedent regarding surrogacy arrangements, states exceedingly diverge in both processes and outcomes. These infertile and same-sex couples desire to have children for many of the same reasons as fertile straight couples do. Such couples have dreamt about having a kid their entire lives and surrogacy may be their only ray of hope.

Professor Radhika Rao categorizes the United States into four broad surrogacy law regimes: "(1) prohibition; (2) inaction; (3) status regulation; and (4) contractual ordering."³¹

Those states that fall into the first category, prohibition, "attempt to put an end to surrogacy, either by means of an outright statutory ban on the practice or by imposing civil

and criminal penalties on persons who enter into or facilitate surrogacy contracts." Arizona, District of Columbia, Indiana, Michigan, Nebraska, and North Dakota, have statutes that prohibit surrogacy contracts.³² Although the Arizona Appellate Court recently ruled its statute unconstitutional, the law has not yet been repealed.³³

Under the second approach, inaction, "the state seeks to withdraw its support by refusing to enforce surrogacy contracts and by declining to prescribe specific rules governing the allocation of parental rights and responsibilities in this context." These states have not officially proscribed surrogacy contracts by statute, but in a form of "passive resistance," their courts may refuse to enforce them. Seven jurisdictions have not specifically banned surrogacy contracts but decline to enforce agreements that involve compensation other than legal, medical, and counselling costs. Those states include Kentucky, Louisiana, New Jersey, New York, North Carolina, Oregon, and Washington.³⁴ In New Jersey for example the Courts have found a surrogacy contract for compensation void but noted: "Nowhere... do we find any legal prohibition against surrogacy when the surrogate mother volunteers, without any payment, to act as a surrogate and is given the right to change her mind and to assert her parental rights".³⁵ Therefore the ban in New

³² Ariz. Rev. Stat. Ann. § 25-218 (2008); D.C. Code §§ 16-401, 402 (2001); Ind. Code § 31-20-1-1 (2007); Mich. Comp. Laws §§ 722.851-861 (2005 & Supp. 2010); Neb. Rev. Stat. 25-21,200 (1995); N.D. Cent. Code Ann. §§ 14-18-05, 08 (2009). See Also Rao, *Supra* Note 29, At 24.

³³ Ariz. Rev. Stat. Ann. 25-218(D) (2009). But See Soos V. Super. Ct. Ex Rel. County Of Maricopa, 897 P.2d 1356 (Ariz. Ct. App. 1994).

³⁴ Spivack, *Supra* Note 7, At 101; For More Information On Kentucky's Surrogacy Law See Rao, *Supra* Note 29, At 24 (Citing Ky. Rev. Stat. Ann. 199.590(4) (Baldwin 2006)); Kentucky Surrogacy Law, Hrc.Org, [Http://www.Hrc.Org/Issues/Parenting/Surrogacy/977.Htm](http://www.Hrc.Org/Issues/Parenting/Surrogacy/977.Htm) (Last Visited Aug. 27, 2011) (Citing Surrogate Parenting Assocs. V. Commonwealth Ex Rel. Armstrong, 704 S.W.2d 209 (Ky. 1986)). Louisiana. See Rao, *Supra* Note 29, At 24 (Citing La. Rev. Stat. Ann. 9:2713 (2009)) ; Louisiana Surrogacy Law, Hrc. Org, [Http://www.Hrc.Org/Issues/Parenting/Surrogacy/998.Htm](http://www.Hrc.Org/Issues/Parenting/Surrogacy/998.Htm) (Last Visited Aug. 27, 2011). New York. See Rao, *Supra* Note 29, At 24 (Citing N.Y. Dom. Rel. Law 123 (Mckinney Supp. 1997-98)); New York Surrogacy Law, Hrc.Org, [Http://www.Hrc.Org/Issues/Parenting/Surrogacy/1505.Htm](http://www.Hrc.Org/Issues/Parenting/Surrogacy/1505.Htm) (Last Visited Aug. 27, 2011) (Citing Ny. Dom. Rel. Law 122 (2009); Doe V. New York City Bd. Of Health, 782 N.Y.S.2d 180 (N.Y. App. Div. 2004); In Re Adoption Of Paul, 550 N.Y.S.2d 815 (N.Y. Fam. Ct. 1990).). New Mexico. See New Mexico Surrogacy Law, [Http://www.Hrc.Org/Issues/Parenting/Surrogacy/1528.Htm](http://www.Hrc.Org/Issues/Parenting/Surrogacy/1528.Htm) (Last Visited Aug. 27, 2011) (Citing N.M. Stat. Ann. § 32a-5-34 (2010)). North Carolina. See North Carolina Surrogacy Law, [Http://www.Hrc.Org/Issues/Parenting/Surrogacy/1154.Htm](http://www.Hrc.Org/Issues/Parenting/Surrogacy/1154.Htm) (Lasted Visited Aug. 27, 2011) (Citing N.C. Gen. Stat. §§ 48-10-102, 103 (2009)).

³⁵ See In Re Baby M, 537 A.2d 1227, 1264 (N.J. 1988).

²⁵ Ruby L. Lee, *New Trends In Global Outsourcing Of Commercial Surrogacy: A Call For Regulation*, 20 Hastings Women's L.J. 275, 275 (2009) At 298-290.

²⁶ Adam P. Plant, *With A Little Help From My Friends: The Intersection Of The Gestational Carrier Surrogacy Agreement, Legislative Inaction, And Medical Advancement*, 54 Ala. L. Rev. 639, 649 (2003).

²⁷ See Johnson V. Calvert, 851 P.2d 776, 799 (Cal. 1993); See Also David D. Meyer, *The Constitutionality Of "Best Interests" Parentage*, 14 Wm. & Mary & Bill Rts. J. 857, 857 (2006).

²⁸ See Generally Spivack, *Supra* Note 7; The Human Rights Campaign, *Surrogacy Laws*, [Http://www.Hrc.Org/Issues/Parenting/Surrogacy/Surrogacy_Laws.Asp](http://www.Hrc.Org/Issues/Parenting/Surrogacy/Surrogacy_Laws.Asp) (Last Visited Aug. 26, 2011).

²⁹ In Re Baby M., 537 A.2d 1227, 1247 (N.J. 1988).

³⁰ Johnson V. Calvert, 851 P.2d At 791.

³¹ Radhika Rao, *Surrogacy Law In The United States: The Outcome Of Ambivalence*, In *Surrogate Motherhood: International Perspectives* 23, 23 (Rachel Cook Et Al. Ed. 2003).

Jersey seems to be against the compensation and not the surrogacy agreement *per se*. In Oregon, the Courts have stated that there is no explicit surrogacy statute in Oregon, and that Oregon will not enforce exchange of money for right of adoption.³⁶ In Washington, the regime is that surrogacy agreements in exchange for money are unlawful but surrogacy agreements are not as such prohibited.³⁷

In the third approach, called status regulation, "individuals may enter into state-approved surrogacy contracts that contain mandatory terms and create preordained status relationships." The states that fall into this category "set limits upon the age and marital status of the parties to a surrogacy arrangement, require the intending mother to be incapable of gestating a pregnancy without physical risk to herself or the foetus, and mandate that the parties be physically fit and psychologically suitable to parent a child." States that fall under this category include Florida, Illinois, Nevada, New Hampshire, Utah, and Virginia. Florida provides for physical requirements for commissioning mothers and gestational surrogates.³⁸ Illinois on the other hand has eligibility requirements for gestational surrogacy and intended parenting.³⁹ Nevada limits surrogacy contracts to intended parents with marriages that are valid under state law.⁴⁰ New Hampshire and Utah establish eligibility requirements, such as being twenty-one years or older and Utah has additional requirements like marital status, intended mother's ability to bear a child without risk, and suitability of the intended parents.⁴¹ Texas, Arkansas, and Tennessee have partial

surrogacy regimes that leave unclear whether surrogacy contracts will be enforced, compensated or not.⁴²

Under the final category, contractual ordering, "the parties are entirely free to negotiate their rights and responsibilities under the surrogacy." The twenty-eight states that fall into this category fail to address surrogacy contracts through legislation at all, leaving unclear whether a Court will later rule such contracts unconstitutional or against public policy based on other persuasive family law statutes.⁴³

There are two major cases in the United States that deal with surrogacy and child rights. They are the *In re Baby M* case and *Johnson v. Calvert* case.

*In re Baby M*⁴⁴ was the first major case in the United States to grapple with the issue of parental rights when a child results from ART.⁴⁵ The parties to the case were, on one side, the intended parents and, on the other, a surrogate who was hired to conceive a child with the intended father.⁴⁶ Importantly, the surrogate mother was also the natural biological mother of the child. The two parties created a surrogacy contract, but, after the birth of the child, the surrogate refused to give the child to the intended parents, even though the contract terminated her parental rights. The court held that the surrogacy contract was invalid and "restore[d] the 'surrogate' as mother of the child." The Supreme Court of New Jersey made clear that the egg and the womb should not be treated as commodities; the court refused to validate the "sale" by contract of the womb. and endorsed the for the award of parental rights by considering "the child's best interests," an analysis typically used in determining child custody rights upon family dissolution.⁴⁷

The California case of *Johnson v. Calvert*⁴⁸ explored a question left open by the New Jersey court in *Baby M*: how to determine parental rights of gestational, not traditional,

³⁶ See Oregon Surrogacy Law, Hrc.Org, [Http://www.Hrc.Org/Issues/Parenting/Surrogacy/1471.Htm](http://www.Hrc.Org/Issues/Parenting/Surrogacy/1471.Htm) (Last Visited Aug. 27, 2011) (Citing *In Re Adoption Of Baby A And Baby B*, 877 P.2d 107, 108 (Or. Ct. App. 1994); 46 Op. Ore. Att'y Gen. 221 (April 19, 1989).

³⁷ See Rao, *Supra* Note 29, At 24. (Citing Wash. Rev. Code Ann. § 26.26.230 (West 1997)); Washington Surrogacy Law, Hrc.Org, [Http://www.Hrc.Org/Issues/Parenting/Surrogacy/1168.Htm](http://www.Hrc.Org/Issues/Parenting/Surrogacy/1168.Htm) (Last Visited Aug. 27, 2011) (Citing Wash. Rev. Code § 26.26.210 (2009); Wash. Rev. Code § 26.26.230 (2009) (Prohibiting Compensation In Surrogacy Contracts In Washington); 1989 Op. Wash. Att'y Gen. 4 (Feb. 17, 1989).

³⁸ For More Information On Florida's Surrogacy Law See Florida Surrogacy Law, Hrc.Org, [Http://www.Hrc.Org/Issues/Parenting/Surrogacy/869.Htm](http://www.Hrc.Org/Issues/Parenting/Surrogacy/869.Htm) (Last Visited Aug. 27, 2011) (Citing Fla. Stat. Ann. § 742.15(2) (2009).

³⁹ See Illinois Surrogacy Law, Hrc.Org, [Http://www.Hrc.Org/Issues/Parenting/Surrogacy/962.Htm](http://www.Hrc.Org/Issues/Parenting/Surrogacy/962.Htm) (Last Visited Aug. 27, 2011) (Citing 750 Ill. Comp. Stat. Ann. 47/20 (West 2005).

⁴⁰ See Nevada Surrogacy Law, Hrc.Org, [Http://www.Hrc.Org/Issues/Parenting/Surrogacy/1291.Htm](http://www.Hrc.Org/Issues/Parenting/Surrogacy/1291.Htm) (Last Visited Aug. 27, 2011) (Citing Nev. Rev. Stat. Ann. § 126.045 (Lexisnexis 2010).

⁴¹ See New Hampshire Surrogacy Law, Hrc.Org, [Http://www.Hrc.Org/Issues/Parenting/Surrogacy/1334.Htm](http://www.Hrc.Org/Issues/Parenting/Surrogacy/1334.Htm) (Last Visited Aug. 27, 2011) (Citing N.H. Rev. Stat. Ann. § 168-B:13 (West

2011). Utah. See Utah Surrogacy Law, Hrc.Org, [Http://www.Hrc.Org/Issues/Parenting/Surrogacy/1803.Htm](http://www.Hrc.Org/Issues/Parenting/Surrogacy/1803.Htm) (Last Visited Apr. 27, 2011) (Citing Utah Code Ann. §§78b-15-801 To-803 (Lexisnexis 2008)).

⁴² *In Re Adoption Of K.F.H.*, 844 S.W.2d 343, 345 (Ark. 1993).

⁴³ See The Human Rights Campaign, Surrogacy Laws, State Laws, Hrc.Org, [Http://www.Hrc.Org/Issues/Parenting/Surrogacy/Surrogacy_Laws.Asp](http://www.Hrc.Org/Issues/Parenting/Surrogacy/Surrogacy_Laws.Asp) (Last Visited Aug. 27, 2011).

⁴⁴ 537 A.2d 1227 (N.J. 1988).

⁴⁵ *Developments In The Law: The Law Of Marriage And Family*, 116 Harv. L. Rev. 1996, 2069 (2003).

⁴⁶ *In Re Baby M*, 537 A.2d At 1235, 1237.

⁴⁷ Linda Kelly, *Family Planning, American Style*, 52 Ala. L. Rev. 943, 948 (2001).

⁴⁸ 851 P.2d 776 (Cal. 1993).

surrogates. The Supreme Court of California noted that though there is support for both the genetic mother's and the gestational mother's parental rights under California law there can be "only one natural mother." The court held that when there are two such conflicting claims of motherhood, the woman "who intended to procreate," essentially the woman to whom the surrogacy contract granted custody, shall be awarded parental rights. The Johnson court implicitly recognized that there is some allowable level of 'commodification' of children and the womb; the court viewed the embryo and the womb as things that can be dealt with by using normal contract principles without violating public policy.⁴⁹ Comparing the "best interests" test used in Baby M with the "intent" test later used by the majority in Johnson, it becomes clear that MRT is changing the way courts and individuals think of the definition of "family." Notably, however, there is some reluctance to embrace the change, as indicated by Justice Kennard's dissent in Johnson advocating for application of the "best interests" test for parentage articulated in Baby M.

7. SURROGACY LAW IN THE UNITED KINGDOM

When the first British surrogate baby was born, the United Kingdom had not yet enacted any law that prohibited or regulated surrogacy arrangements.⁵⁰ The British government had established a committee to investigate and report its findings regarding human assisted reproduction issues such as surrogacy, in vitro fertilization, and use of human embryos, but it was still considering the committee's findings when Baby Cotton was born on January 4, 1985.⁵¹ The birth created so much controversy, however, that within six months the British Government passed the Surrogacy Arrangements Act, making it criminal for third parties to commercially benefit from surrogacy arrangements.⁵² The Warnock Committee, which had been established in 1982, recommended all surrogacy arrangements be banned and enforced with criminal law penalties.⁵³ The committee advised the imposition of criminal penalties upon the "creation or operation of profit-making and non profit-making surrogate agencies, as well as the actions of 'professionals and others who knowingly assist in the establishment of a surrogate pregnancy.'" The

committee did not suggest banning private, or altruistic, surrogacy arrangements, however, which never became illegal in the United Kingdom.

The UK surrogacy law regime contains two separate Acts regarding surrogacy, one preventing commercial arrangements and the other providing rights to intended parents.⁵⁴ The aim of the UK legislations seem to be to protect the interests of the surrogate, the intended parents and the unborn child. Surrogacy agreements are legal in Britain but are not legally binding in court, even with a formal written contract. Family judges must make decisions based on the best interests of the child, and not the wishes of the parents or surrogates. Commercial surrogacy, including advertising (under Section 3), is a crime but voluntary arrangements between a woman and would-be parents are not illegal, nor are not-for-profit surrogacy agencies. A surrogate mother is required to register the baby herself as her child. The couple who aim to bring up the child can become the legal parents through a parenting order. A court will appoint a 'parental order reporter' (a social worker) to ensure that a series of requirements are met. These say the parents must be over 18, married, civil partners or in an 'enduring relationship'. One must be the biological parent of the child. The conception must have taken place artificially, but methods can include home insemination.

The Surrogacy Arrangements Act made it criminal under section 4 for a third party to receive a financial benefit through surrogacy, resulting in a fine of up to £2,000.⁵⁵ In order to determine the surrogate mother's intent to give the child to the putative parents, the Act examines all the circumstances, including any promise or agreement regarding payment.⁵⁶ The Act also makes it illegal for third parties, such as members of the surrogate mother's family, to receive or even contemplate payment, even if they later decide to forego it.⁵⁷ The Act does not make the payment or receipt of compensation by the surrogate mother illegal; however, these actions could trigger penalties under the Adoption Act of 1958. Complicating things even further, payment to the surrogate to cover "reasonable expenses" is allowed under the Act, but because the term is not defined,

⁴⁹ Jennifer S. Hendricks, *Essentially A Mother*, 13 Wm. & Mary J. Women & L. 429, 429-33 (2007).

⁵⁰ Diana Brahams, *The Hasty British Ban On Commercial Surrogacy*, 17 Hastings Center Rep. 16, 18 (1987)

⁵¹ *Id.* At 16-17

⁵² Surrogacy Arrangements Act, 1985, C. 49, Available At [Www.Surrogacy.Org.Uk/Pdf/Sur-Act.Pdf](http://www.surrogacy.org.uk/Pdf/Sur-Act.Pdf) (Last Visited Aug. 26, 2011)

⁵³ Brahams, *Supra* Note 48 At 17.

⁵⁴ See Surrogacy Arrangements Act, 1985, C. 49, § 2, Available At [Www.Surrogacy.Org.Uk/Pdf/Sur-Act.Pdf](http://www.surrogacy.org.uk/Pdf/Sur-Act.Pdf) (Last Visited Aug. 26, 2011); Human Fertilisation And Embryology Act, 2008, C. 22, Available At [Http://Www.Legislation.Gov.Uk/Ukpga/2008/22/Pdfs/Ukpga_2008002_2_En.Pdf](http://www.legislation.gov.uk/ukpga/2008/22/Pdfs/ukpga_2008002_2_En.Pdf) (Last Visited Aug. 26, 2011).

⁵⁵ Surrogacy Arrangements Act, 1985, C. 49, §§ 1(2), 4(1).

⁵⁶ Surrogacy Arrangements Act, 1985, C. 49, §§2(3), (4), (6), (9).

⁵⁷ See Surrogacy Arrangements Act, 1985, C. 49, §§ 2(1), (5), (7).

it is seemingly left up to the parties to determine what is in fact reasonable, which could lead to abuse.

However, because so many legal issues arose with the surrogate and usually also her husband being treated as the child's legal parents at birth, leaving the intended parents with no legal connection with their child, even where both are the biological parents," the Department of Health began considering new draft regulations in 2009.⁵⁸ These new provisions, which began staged implementation in 2009, avoid confusion and excess litigation after the birth of a child from a surrogate mother by allowing same-sex couples the opportunity to obtain a parental order, which triggers the re-issue of the birth certificate.⁵⁹ By allowing the intended parents to be listed on their children's birth certificates, they can avoid unnecessary litigation regarding parentage, custody or even intestacy rights should a tragedy occur before the adoption process or a custody dispute is complete. Under the 2008 Human Fertilisation and Embryology Act, a judge can issue a parental order upon a showing that the intended parents "are in a stable relationship; that no fees, other than expenses, are paid to the surrogate mother; and that it is in the child's best interest..."⁶⁰ Before the legislation took effect, only heterosexual married couples could use the parental order process with their surrogate mother, forcing same-sex and unmarried couples to go through the extensive and complex adoption process involving social workers and other professional groups. As a result, the surrogate mother for same-sex and unmarried couples retained rights as the legal guardian on the birth certificate until the adoption process was completed. If the surrogate mother was married, her husband's name also showed up on the birth certificate. The regulations allow a lesbian mother to name her female partner as the child's other parent and two men can also be named as parents using the parental order method.⁶¹ Although opponents argue that "birth certificates should reflect how a baby is 'generated,'... [b]irth

registration procedures are governed by law, not biology," it has never been a requirement that birth certificates list both biological parents. For example, an unmarried woman has the option to choose whether she wants to place the father's name on the birth certificate.

7(A). SOME CRITICISMS OF THE UNIFORM SURROGACY LEGISLATION IN UK.

As is the case in the U.S., opponents of surrogacy complained that the UK legislation ignored the importance of a biological link between the mother and child and allowed for the potential exploitation of women through surrogacy.⁶² The critics of surrogacy contracts however, focus only on the minority of cases that result in litigation.⁶³ Diana Brahams, an opponent of the Surrogacy Arrangements Act, suggests that, from the child's point of view, there is no difference between altruistic and commercial surrogacy.⁶⁴ Brahams argues that although it may be morally abhorrent to only consider children in terms of money, the focus should be on the happiness the procedure brings to the infertile couple and the child's placement in a happy environment. Scholars like Guido Pennings argue that bans or restrictions on reproductive assistance only lead to reproductive tourism.⁶⁵ Pennings opines that "[t]he best balance would be to adopt a 'soft' law which is mainly focused on safety issues and good clinical practice and does not impose strict prohibitions or obligations on anyone."

Dr. Elly Teman notes that most people believe that Baby M. case (discussed above) involving intense litigation between the surrogate and intended parents, is the rule rather than the exception.⁶⁶ Teman explains that intended parents expect that the surrogate will take good care of the child while *in utero*, and the surrogate trusts the intended parents will "be up front with them about who they are." Only when that trust is broken does litigation occur. Teman suggests that one way to avoid such disputes between

⁵⁸ Natalie Gamble & Louisa Ghevaert, *Moving Surrogacy Law Forward? The Department Of Health's Consultation On Parental Orders*, Bio News.Org.Uk, [Http://Www.Bionews.Org.Uk/Page_50639.Asp](http://www.Bionews.Org.Uk/Page_50639.Asp) (Last Visited Aug 29, 2011).

⁵⁹ See Human Fertilisation And Embryology Act 2008, Legislation.Gov.Uk, [Http://Www.Legislation.Gov.Uk/ukpga/2008/22/Section/54](http://www.Legislation.Gov.Uk/ukpga/2008/22/Section/54) (Last Visited Aug. 16, 2011); Louisa Ghevaert, *Birth Certificates: A New Era?*, Bionews.Org.Uk, [Http://Www.Bionews.Org.Uk/Page_59481.Asp](http://www.Bionews.Org.Uk/Page_59481.Asp) (Last Visited Aug. 30, 2010).

⁶⁰ Robin Mckie, *New Surrogacy Law Eases The Way For Gay Men To Become Legal Parents*, Guardian.Co.Uk, Available At [Http://Www.Guardian.Co.Uk/World/2010/Mar/28/Surrogacy-Gay-Men-Legal-Parents](http://www.Guardian.Co.Uk/World/2010/Mar/28/Surrogacy-Gay-Men-Legal-Parents) (Last Visited Aug. 28, 2011).

⁶¹ *Supra* Note 57.

⁶² See, Olga Van Den Akker, *The Importance Of A Genetic Link In Mothers Commissioning A Surrogate Baby In The Uk*, 15 Hum. Reprod. 1849, 1849-50, 1853 (2000). See Also B.R. Sharma, *Forensic Considerations Of Surrogacy-An Overview*, 13 J. Clinical Forensic Med. 80, 81 (2006).

⁶³ See, Elly Teman, *Surrogacy Behind The Headlines*, Bionews.Org.Uk [Http://Www.Bionews.Org.Uk/Page_55320.Asp](http://www.Bionews.Org.Uk/Page_55320.Asp) (Last Visited Sep.3, 2011).

⁶⁴ See, Brahams, *Supra* Note 48, At 17.

⁶⁵ G Pennings, *Reproductive Tourism As Moral Pluralism In Motion*, 28 J. Inst. Med. Ethics 337, 337 (2002). At 38.

⁶⁶ See Elly Teman, *Surrogacy Behind The Headlines*, Bionews.Org.Uk [Http://Www.Bionews.Org.Uk/Page_55320.Asp](http://www.Bionews.Org.Uk/Page_55320.Asp) (Last Visited Sep.3, 2011).

surrogates and intended parents is for the parties to treat the arrangement more like a relationship than a business transaction. Teman advises that to avoid disputes, the intended parents "need to understand their surrogate's expectations in advance, to be upfront with her about who they are, and give her the credit and respect she deserves."

8. INDIA AND THE DRAFT ART (REGULATION) BILL, 2010- A CRITICAL ANALYSIS

At the outset, we believe that that the United Kingdom's model of having a uniform national legislation to regulate Assisted Reproductive Technology is best suited to India. We also believe that, considering the highly diverse cultures that prevail amongst different States, setting up State Advisory Bodies (under section 6) would ensure that the customs and practices of the people of the region are duly considered before making regulations.

Women and health rights activists have been looking forward to the drafting of this Bill in light of the unregulated practice of these technologies and the increasing commercialisation and commodification of women's reproductive tissues. The Bill is based on the 'National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India' issued by the ICMR in 2005. The Draft Bill tends to regularise and promote the interest of the providers of these technologies rather than regulate and monitor the current practices. The Bill also actively promotes medical tourism in India for reproductive purposes.

The legislation is self-contradictory when it comes to protecting the anonymity of the surrogate. The document, while insisting on a number of measures to be taken to ensure the anonymity of the surrogate, states that the surrogate mother should register under her own name for the purpose of medical treatment and provide the name of the couple for whom she is acting as surrogate. The moment the legislation makes it mandatory for the surrogate to disclose her identity her privacy and anonymity is risked.

The legal parentage of children born through surrogacy has not been adequately tackled and situations where the intended couple no longer want the child, split up, pass away or abandon the child have not been addressed. The process of handing over the child from the surrogate to the intended parents has also not been adequately addressed. The legislation also clarifies that the name on the birth

certificate will be that of the genetic parents, thus equating the term with intended parents/parent. Such a clause, although protecting the anonymity of the donor, presumes that the intended parents will also be the genetic parents.

The Bill states that a woman may act as a surrogate for three successful births in her lifetime, including a maximum of three attempts at pregnancy for a particular couple. This takes the number of times she can undergo IVF cycles to a high figure, thus jeopardising her physical and mental health. Along similar lines, the Bill permits a woman to donate her eggs six times in her life, at intervals of three months, which again could be hazardous for her health. But an important aspect of the maximum number of eggs that can be retrieved in each IVF cycle is still left untouched in the legislation, thereby completely leaving it in the hands of the providers to decide on this.

9. ICMR GUIDELINES ON MEDICAL ETHICS IN SURROGACY:

The Indian Council for Medical Research (ICMR) published the "Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, 2005" (hereafter called 'The Guidelines' which until the ART Bill is passed serves as the sole regulator of ART in India. The ICMR prescribes informed consent which after duly counselling the couple / oocyte/ semen donor, an informed and written consent should be taken from both the spouses as well as the donor, as the case may be. They should be explained the various risk factors associated with the procedures in simple language and the words that they can understand. These include risks associated with ovarian hyper stimulation, anaesthetic procedures, and invasive procedures like laparoscopy, aspiration of ovum *etc.* They should be explained the possibility of multiple pregnancies, ectopic gestation, increased rate of spontaneous abortion, premature births, higher perinatal and infant mortality as well as growth and developmental problems, possible side effects and the risks of treatment to the women and the risks associated with multiple pregnancy.

The couple should also be explained –

- i. That there is no guarantee on the success / failure of the procedure and the need to reduce the number of viable fetuses, in order to ensure the survival of at least two fetuses;
- ii. That there may be possible disruption of the patient's domestic life which the treatment may cause;

- iii. About the possible deterioration of gametes or embryos associated with storage, and possible pain and discomfort;
- iv. About the cost (with suitable break-up) to the patient of the treatment proposed and of an alternative treatment, if any (there must be no other "hidden costs").
- v. About the importance of informing the clinic of the result of the pregnancy in a pre-paid envelope; and
- vi. About the advantages and disadvantages of continuing treatment after a certain number of attempts.

Informed consent should include information regarding use of spare embryos. It should be made clear whether embryos that are not used for transfer could or could not be used for research purposes or implanted in another woman's womb, or "preserved" for use at a later date or destroyed. Investigators should ensure that participants are informed and consent is taken afresh in writing on the above issues at every stage. However with regard to consent it is stated that Consent may be withdrawn at any time before implantation specific consent must be obtained from couples who have their gametes or embryos frozen, with regard to what should be done with them in case of death, or if any of the parties becomes incapable of varying or revoking her or his consent.

The Hon'ble Supreme Court of India recognised "the right to privacy" in *Kharak Singh v. State of U.P.*⁶⁷ and subsequently in *Gobind v. State of M.P.*⁶⁸. The right plays an important role in medical ethics. Confidentiality of the entire procedure and its outcome is advisable and therefore, no relative should be accepted as a donor in order to avoid identification and claims of parenthood and inheritance rights. Any information about clients and donors must be kept confidential. No information about the treatment of couples provided under a treatment agreement may be disclosed to anyone other than the accreditation authority or persons covered by the license, except with the consent of the person(s) to whom the information relates, or in a medical emergency concerning the patient, or a court order. It is this person(s)' right to decide what information will be passed on and to whom. Written consent of the donor should be taken towards unrestricted use of sperms or oocytes for AR, as well as an undertaking from him / her that he / she will not attempt to seek the identity of the recipient. In case the donor is

married, the written consent of the spouse should be taken, if possible.

It is also desirable to restrict the use of semen from the same donor to a maximum of 10 pregnancies to avoid the possibility of an incestuous relationship occurring among the off springs at a later date. In case of the oocyte donor, incurring any health problems related to the process of donation, the costs of the subsequent health care should be borne by the potential recipient couple irrespective of whether they receive oocyte donation as planned or not.

In case of unused surplus/ spare embryos, consent of the concerned couple should be obtained to cryopreserve such embryos for donation to other needy couples. Such embryo donations should be kept anonymous. The ownership rights of such embryos rest with the couple concerned.

Further it has been directed that respect for Gametes and embryos should be fostered. Respect for embryo can be shown by -

1. Accepting limits on what can be done in embryo research;
2. Committing to an inter-disciplinary process of peer group review of planned research; and
3. Carrying out an informed consent process for gamete and embryo donors.

Also, respect for the embryo's moral status can be shown by careful regulation of conditions of research, safeguards against commercial exploitation of embryo research, and limiting the time within which research can be done on embryo up to 14 days' growth i.e. when the primitive streak appears. This restriction is in keeping with the policy in several nations that permit research with embryos. At this time, the development of nervous system begins and the embryo begins to become a distinct individual.

With increase in the practice of surrogacy the Obstetrician-gynaecologist who facilitates surrogacy arrangements should be well aware of the any statues or court cases in the state in which he or she practices. In counselling individuals seeking a child through surrogacy or a woman who is considering surrogate gestation, the physician should encourage consideration of the possible consequences of surrogacy arrangements, including potential legal complications.

When approached by a couple considering surrogacy, the physician should, as in all other aspects of medical care, be

⁶⁷ Air 1963 Sc 1295: (1964) 1 Scr 332

⁶⁸ (1975) 2 Scc 148

certain that there will be full discussion of ethical and legal issues as well as medical risks, benefits, and alternatives. Due to the inherent risks in surrogacy arrangements, such arrangements should be considered only in the case of infertility or serious health-related needs. A physician may justifiably decline to participate in initiating surrogacy arrangements for ethical or medical reasons.

10. Conclusion

In conclusion, we are of the opinion that the best way forward for India to regulate ART is by a national legislation like the ART but with the presence of State-level bodies. The UK's experience with the Human Fertilisation

and Embryology Act indicates that the use of parental orders is a way to avoid litigation regarding parentage after a child is born. This is because it eliminates the fear that the intended parents may not be good enough to raise the child in a healthy environment. In India, the presence of women and experts in ART on the advisory boards would bring valuable perspective to the bodies. The resolution of disputes before these bodies would also make sure that the cases are handled by expert members rather than a civil judge who may not have the requisite technical understanding. Similarly, the presence of ethical boundaries which have to be strictly adhered to by the doctors and clinics would ensure that the constitutionally guaranteed rights are not infringed.